REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL REVISION CASE NO. 1A OF 2021

CONSOLDATED WITH 1B OF 2021

REPUBLIC.....ODPP

VERSUS

ABUSH TAMASKE & 5 OTHERS.....APPLICANTS

AND

REPUBLIC OF KENYA

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CRIMINAL REVISION CASE NO. 1B OF 2020

REPUBLIC.....ODPP

VERSUS

EYASH ABORE & 9 OTHERS.....APPLICANTS

RULING

1. Before the Court are two Applications for Criminal Revision brought by two sets of Accused persons seeking to review the convictions entered and sentences imposed in the following matters: -

i) Maua Chief Magistrate Criminal Case No. E260 of 2020 issued on 11th November 2020 by Hon. Millicent Nyiegi SRM

ii) Maua Chief Magistrate Criminal Case No. E 477 of 2020 issued on 16th December 2020 by Hon. C. K. Obara.

2. In both matters, all the Applicants were charged with the offence of 'Being Unlawfully Present in Kenya Contrary to Section 53 (1) (j) as read with Section 53 (2) of the Kenya Citizenship and Immigration Act No. 12 of 2011.

3. For Criminal Case No. E260 of 2020, the particulars where that 'on the 8th day of November 2020 at Maua – Meru road, in Igembe Central Sub County within Meru County, being Ethiopian citizens, were found unlawfully present in Kenya without valid documents from the Immigration Department.'

4. For Criminal Case No. E477 of 2020, the particulars of offence were that 'on the 15th day of December 2020, at Mutuati area along Kachuru – Mutuati road, in Igembe North Sub County within Meru County, being Ethiopian nationals, you were found being unlawfully present in Kenya in that you did not have a valid pass or permit to allow you to remain in Kenya in contravention of the said Act.'

5. In both matters, all the Accused persons pleaded guilty and verified that the facts as read out from the particulars of offence were correct. Their plea of guilty was therefore unequivocal.

6. In mitigation, for Criminal Case No. E260 of 2020, Accused 1 said that there is war in their country and he prays to be escorted back. Accused 3 asked to be taken back home. Accused 6 prayed to be escorted back. Accused 2, 4 and 5 asked to be forgiven. In Criminal Case No. E477 of 2020, in mitigation, all the Accused persons only asked to be forgiven.

7. The Learned Magistrate thereby convicted them on their own plea of guilty. Each of them was ordered to pay a fine of Ksh 100,000/= in default of which they would each be sentenced to six (6) months imprisonment. Once the fines are paid and/or the sentences are served, each Accused person is to be repatriated back to their country of origin. In meting the sentence, the Courts for both matters considered that the offence is quite rampant in the region.

Submissions by the applicants

8. The Accused persons have applied for revision pursuant to the provisions of Section 362 of the Criminal Procedure Code, Cap 75 Laws of Kenya. They argue that they are Ethiopian nationals who were fleeing from the war in their country; and that pursuant to the provisions of the Constitution and the various regional and international treaties and conventions that Kenya has ratified, the Learned Magistrate and the Prosecution misapplied the law in treating the Applicants as criminals instead of refugees, who need and require assistance and protection.

9. They pray that the decision of the lower Court be revised and that the Court quashes the proceedings at the lower Court, the conviction and the sentence and instead order for the Accused persons to be repatriated back to their country or be handed over to the Commissioner for Refugees.

Revisionary jurisdiction

10. Indeed, Section 362 and 364 of the Criminal Procedure Code Cap. 75 gives this Court *appellate* jurisdiction to exercise revision. Under Section 348 of the Criminal Procedure Code, if an Accused person is convicted of his own plea of guilty, the said conviction may not be challenged. The said Section provides as follows: -

> ***348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.***

11. The difficulty of challenging a conviction entered following a plea of guilty was considered in the case of ***Haji Hamadi Haji & 4 Others vs Republic Criminal Revision No. 380 of 2018, (2018) eKLR*** where Njoki Mwangi J. held as follows: -

> ***"…Under the provisions of Section 348 of the Criminal Procedure Code, the applicants cannot challenge their conviction since they were convicted on their own plea of guilty. They can however challenge the sentence that was imposed against them…"***

12. In the premises, following a conviction and sentence based on an Accused person's plea of guilty, the only thing that is available under statute for challenge, either by way of revision or appeal is the sentence meted out. To successfully challenge a sentence, it must be shown that there were some illegalities and/or factors that the trial Court may not have taken into account in meting out the sentence. In exercising its *revisionary* jurisdiction under section 364 (1) (a) of the CPC, the High court has power to invoke its *appellate* jurisdiction under section 354 as follows:

> ***"364. Powers of High Court on revision***
>
> *(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—*
>
> > *a) in the case of a conviction,* ***exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358,*** *and may enhance the sentence;…."*

This court may, therefore, deal with the question of severity of sentence in its revisionary jurisdiction.

Constitutional application

13. There exists, however, an avenue of challenge outside the revision procedure of the Criminal Procedure Code, where under the Constitution of Kenya 2010, the High Court has a supervisory jurisdiction over subordinate courts to ensure legality of their procedures. This jurisdiction is, however, to be invoked as constitutional petition under Article 165 (6) and (7) of the Constitution with a full opportunity to the DPP to respond. To bring such constitutional application under the simple procedure of revision is to abuse process of the court. The procedure for revision is reserved for simple matters of errors of law in the trial proceedings, conviction and sentence set out in section 362 of the Criminal Procedure as follows:

> ***"362. Power of High Court to call for records***
>
> *The High Court may call for and examine the record of any criminal proceedings before any subordinate court* ***for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."***

14. Revision is generally not available to the party who could have appealed. See section 364 (5) of the Criminal Procedure Code that

"When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed." The applicants could have appealed from the severity of sentence under section 348 of the Criminal Procedure Code. However, the court is at liberty to take the matter of its own motion under section 364 (1) having been made aware of the question through the application by the applicants. In the old case of ***Gershom Watene*** (1951) 24(2) LRK 143, noted in E. Trevelyan's ***Kenya Criminal Revision Digest*** (1897-1964) at 84, the High Court (then called the Supreme Court) considered provision in *pari materia* with section 364(5) of the CPC and held:

> *"HELD: Section 363(5) does not preclude the Supreme Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of appeal and does not derogate from the wide powers conferred by section 361 and section 363(1).* ***The Court can, in its discretion, act sui moto even where the matter has been brought to its notice by an aggrieved party who had a right of appeal.*** *[Chhagan Raja vs. Gordhan Gopal (7) [1936 17(1) LRK 69], distinguished.]"*

15. This Court only observes that the issues urged by the counsel for the applicants as to the validity of the proceedings in view of want of evidence that the applicants had been in the country for more than 30 days, as to the charging of the applicants in joint charges and the order for their return to Ethiopia running foul of the *non-refoulment* principle were all matters that went beyond the strict ambit of revision proceedings. The applicant ought to have moved the court by a substantive petition to which the respondent DPP would have been able to respond fully consistently with the right to fair hearing under Article 50 (1) of the Constitution of Kenya.

16. The Court has, however, considered the issues, in discretion and found as follows. The applicants were barred by section 348 of the Criminal Procedure Code from challenging their conviction on their own plea of guilty. Having pleaded guilty to the charges the applicants denied the prosecution an opportunity to demonstrate by evidence the facts on the case which may well have shown that the applicants were in the country for the period of 3o days alleged. However, in view of what the court finds below the period of allowance of 30 days before seeking registration as a refugee is no longer part of Kenya law since 2014 statutory amendments. The joinder of accused persons in the circumstances of this case is permitted under section 136 (c) of the Criminal Procedure Code in case of accused person who commit albeit individually, the same offence on the same day and at the same time and place. Section 136 provides as follows:

> ***"136. Joinder of two or more accused in one charge or information***
>
> *The following persons may be joined in one charge or information and may be tried together—*
>
> *a) persons accused of the same offence committed in the course of the same transaction;*
>
> *b) persons accused of an offence and persons accused of abetment, or of an attempt to commit the offence;*
>
> ***c) persons accused of more offences than one of the same kind (that is to say, offences punishable with the same amount of punishment under the same section of the Penal Code or of any other Act or law) committed by them jointly within a period of twelve months;***
>
> *d) persons accused of different offences committed in the course of the same transaction;*
>
> *e) persons accused of an offence under Chapters XXVI to XXX, inclusive, of the Penal Code (Cap. 63), and persons accused of receiving or retaining property, possession of which is alleged to have been transferred by an offence committed by the first-named persons, or of abetment of or attempting to commit either of the last-named offences;*
>
> *f) persons accused of an offence relating to counterfeit coin under Chapter XXXVI of the Penal Code, and persons accused of another offence under that Chapter relating to the same coin, or of abetment of or attempting to commit any such offence."*

As discussed below non-refoulment does not apply to the facts of this case.

Legality of sentence

17. This Court, in discretion, looks at the legality of the sentence imposed by the trial Court as a matter brought to its notice by the applicants' application for revision. Section 53(2) of the Kenya Citizenship and Immigration Act, the section providing for the penalty due to a person found guilty of an offence in the Act provides as follows: -

> ***"****(2) Any person convicted of an offence under this section shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both****".***

18. In the premises, the Learned Magistrates acted within the confines of Sec 52 aforesaid in issuing a fine of Ksh.100,000/= and in the alternative a term of six (6) months imprisonment.

Registration as refugees or asylum seekers

19. The Accused persons have submitted that they are Ethiopian Nationals who are fleeing war from their country. In essence, asylum seekers. One thing is clear, this issue was never raised during the proceedings at the trial Court with the exception of Accused 1 in Criminal Case No. E260 of 2020 who during mitigation indicated that there is war in their country.

20. As regards the remarks made by Accused 1 in Criminal Case No. E260 of 2020 during mitigation, it is the common ground that any person, not being a Kenyan Citizen who claims to be a refugee must make an application to the Commissioner for Refugees to be so recognized as a refugee. In fact, Section 33 (2) (f) of the Kenya Citizenship and Immigration Act provides that ***an asylum seeker whose application for grant of refugee status has been rejected under the Refugee Act, 2006 is considered an inadmissible person***. This Section, therefore, envisages that any person seeking asylum must make an application for grant of refugee status.

21. The refugee determination process is an elaborate one with clear policies and guidelines. Section 11 (1) and (3) of the Refugees Act, 2006 provides that: -

> ***(1) Any person who has entered Kenya, whether lawfully or otherwise and wishes to remain within Kenya as a refugee in terms of this Act shall make his intentions known by appearing in person before the Commissioner immediately upon his entry into Kenya.***
>
> ***(3) Without prejudice to the provisions of this section, no person claiming to be a refugee within the meaning of section 3(1) shall merely, by reason of illegal entry be declared a prohibited immigrant, detained or penalized in any way save that any person, who after entering Kenya, or who is within Kenya fails to comply with subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding six months, or to both.***

22. The provisions of the Refugees Act, 2006, require that when one claims to be a refugee, it is clearly an offence to fail to present oneself before the Commissioner of Refugees **immediately** upon his entry into Kenya. It would appear that the submission by Counsel for the applicant as to the 30-day period during which a foreigner comes into the country is required to seek registration as a refugee is mistaken and based on the state of the law before 2014. Significantly, pursuant to Section 45 of the Security Laws Amendment Act No. 19 of 2014, Section 11 of the Refugees Act was amended by deleting the words ***'or in any case within 30 days after entry'*** as follows:

> ***"45. Section I I of the Refugees Act is amended in section I I subsection (1) by deleting the words "or in any case within thirty days after his entry".***"

This means that such an application for one to be recognized as a refugee must be made **immediately upon entry into the country**. The objective of this provision of law is definitely to have any person seeking to be recognized as a refugee to make his intentions known as soon as possible upon entry into Kenya.

23. Whereas in the case of ***Coalition for Reform and Democracy (CORD) & Another v Republic of Kenya & Another (2015) eKLR Petition No. 628 & 630 of 2014 & Another***, the Court (G. V. Odunga, J.) declared certain provisions in the Security Laws Amendment Act No. 19 of 2014 unconstitutional for violating various provisions of the Constitution in the Bill of Rights, section 45 of the said Act, which is the section that amended Section 11 of the Refugees Act was not among those declared unconstitutional and neither was it the subject of that Petition. The amendments effected by section 45 of the Security Laws Amendment Act remains a valid provision of law whose effect is that the thirty (30) day window period within which a person was allowed to make his application after entry into Kenya was done away with.

24. Further, Section 13 of the Refugees Act provides as follows: -

> ***Notwithstanding the provisions of the Immigration Act (Cap 172) or the Aliens Restriction Act (Cap 172), no proceedings shall be instituted against any person or any member of his family in respect of his unlawful presence within Kenya-***
>
> ***a) If such a person has made a bona fide application under Section 11 for recognition as a refugee, until a decision has been made on the application and, where appropriate, such person has had an opportunity to exhaust his right of appeal under that section; or***
>
> ***b) If such person becomes a refugee.***

25. The Applicants claim that they should not have been charged with the offence as the thirty-day window period had not lapsed. The aforementioned provisions, that is to say Section 13 as read together with Section 11 of the Refugees Act, defeat the Applicants' argument on the thirty (30) day window period within which they were allowed to make an application following the amendments made to Section 11 of the Act in 2014, the thirty (30) day window period had ceased to exist.

26. This Court, therefore, expects that any Accused who so claims to be a refugee and/or an asylum seeker would reasonably adduce evidence to prove the same. The Refugee Affairs Secretariat is the body responsible for profiling such persons claiming to be asylum seekers. In their application for revision, despite alleging that they ought to be treated as Refugees, the Applicants have not annexed any official documents to confirm their refugee status and/or even confirm the pendency of an application made by them under Section 11 of the Refugees Act to be considered as refugees.

27. In the case of ***Bivamunda Erick vs Republic Criminal Revision No. 6 of 2014 eKLR*** Tuiyott F J, in dismissing an argument wherein the Applicant claimed to be a Refugee and thereby precluded from prosecution pursuant to Section 13 of the Refugees Act held as follows; -

> ***"…Mr Onsongo asks me to find that the Applicant is a Refugee and is therefore precluded from Prosecution under the provision of Section 13. But I have a difficulty in accepting that argument. I have looked at the entire Lower Court record and there is no evidence that the Applicant is that person envisaged in Section 3. It may not be enough for the Applicant to merely say "I come to be as a refugee (sic)." That is not sufficient to bring him within the ambit of Section 3. And at the hearing of the Revision no evidence was placed before Court suggesting that he was indeed a refugee as contemplated by the Statute…"***

28. In the absence of tangible evidence to confirm their refugee status, this Court finds it doubtful as to whether the Applicants are refugees. This Court takes cognizance of the serious nature of this offence. The entry of undocumented persons into the Country can have serious ramifications on the security of the nation. It being that the Accused persons unequivocally pleaded guilty in the trial Court, this Court does not consider the Accused persons as asylum seekers. Had the Applicants adduced evidence to confirm their refugee status, this Court would have been more inclined to allow their application for revision..

29. Further, this Court observes that the Accused persons were arrested in Meru County. One set of Accused persons were arrested at Mutuati Area, along Kachuru Mutuati Road and the other set were arrested at Maua-Meru Road. These 2 points of arrest are deep within the interior parts of the country and are way past the borders and/or points of entry into Kenya, and this Court finds the real intention of the Accused persons in entering Kenya remains questionable. Coming from Ethiopia to Kenya, the entry point is the Moyale border post. The court may take judicial notice of the long distance between Moyale, the Kenya/Ethiopia border post and Maua, where the Accused persons were arrested. Taking into account the time taken to travel from Moyale to Maua, this Court reasonably expects that by the time the Accused persons were getting to Maua they ought to have already submitted their application before the Commissioner for Refugees. There are various points where they could have done this including right at Moyale. Further, had the Accused persons indeed intended to seek asylum in Kenya, they would have indicated so right at the point of arrest and asked to be escorted to the Commissioner for Refugees. This was not done.

Principle of non-refoulement

30. Counsel for the Applicants cited the case of ***Kenya National Human Rights Commission on Human Rights & Another v Attorney General & 3 Other*** (2017) eKLR on the principle oof non-refoulment. With respect, this Court finds the said authority to be inapplicable herein, and makes a distinction between the subject of the said case and the issues arising in the instant application. First and foremost, the said Petition was filed to challenge the constitutionality of the Governments directive on closure of refugee camps. The persons affected in the said Petition were those whose refugee status had already been determined and were already living in the refugee camps in the country. The main principle discussed therein was on non-refoulment which requires that refugees and asylum applicants be protected against return to a place where their life or freedom might be threatened until it has been reliably ascertained that such threats do not exist anymore. These issues can clearly be contrasted from those herein as in the present case, the refugee status of the applicant is yet to be determined and they are yet to make their applications.

31. During mitigation, one of the Accused persons, as has been identified above claimed that there is war in their country. In addition, he asked to be escorted back to their country. This statement is indeed baffling as one wonders why a person who claims to be fleeing from war in his country of origin would be praying to be escorted back. The reasonable expectation or request to be made by such a person is to be allowed to remain in the country and be assisted to conclude his refugee application process, if any such application process had been initiated. It would appear that the applicant was seeking to avoid the consequences of his unlawful act by seeking to be returned to his country, which he claimed was at war.

Conclusion

32. This Court finds no reason to disturb the findings of the trial Court, for the reasons firstly, that the Accused persons were convicted based on their own plea of guilty; secondly, that the sentenced imposed by the trial Court was within the confines of the law; and thirdly that the Accused persons were yet to make any application before the Commissioner for Refugees as required of them by Section 11 of the Refugees Act, which by the amendment by section 45 of the Security Laws Amendment Act No. 19 of 2014 does not provide for a moratorium of 30 days as was previously the case..

33. This Court, therefore, upholds the finding of the trial Court. The Accused persons are to continue serving their sentence of six (6) months imprisonment in default of payment of the fine of Ksh.100,000/=, and to be returned to their country of origin upon completion of the sentence.

ORDERS

34. In the end, this Court makes the following Orders:

> ***i) The consolidated application for revision of the Judgment and Orders of the lower Court in both Maua Chief Magistrate's Court Criminal Case No. E260 and Criminal Case No. E477 is declined.***
>
> ***ii) The conviction and sentence of the lower Court in both Criminal Case No. E260 and Criminal Case No. E477 is hereby upheld.***
>
> ***iii) Upon payment of fine and/or service of the imprisonment term, each of the Accused persons to be repatriated back to their Country of origin as had been ordered by the lower Court.***

Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF FEBRUARY 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mbogo & Muriuki Advocates for the Applicants

Ms Nandwa, Prosecution Counsel for the Respondent.